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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Petitioners,
v.
HELEN A. POWERS, Secretary of the North Carolina Department of Revenue, *et al.*,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rights of federal pensioners and military personnel subject to North Carolina income tax to protection from discriminatory taxation under 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity were clearly established since, at least, 1985?

2. Whether the former North Carolina Secretary of Revenue, respondent Helen A. Powers, violated the clearly established rights of federal pensioners and military personnel to an adequate post-deprivation remedy for unconstitutional taxation when she imposed just four days before the 1988 tax return deadline a 30-day statute of limitations within which to demand refunds, which deadline she could not administer and which was contrary to all her Department's previous official publications, tax instruction booklets, administrative regulations and official advice?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit include: (1) Petitioners, who are 394 federal pensioners and seven military personnel, on behalf of themselves and all others similarly situated, have paid state income tax on their federal retirement benefits and military compensation (a list of named individual petitioners appears as Appendix D, *infra* at 33a); (2) Respondent, Helen A. Powers, the former Secretary of the North Carolina Department of Revenue. Other defendants not directly involved in the appellate decision below include the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norman W. Swanson and the 393 other named federal pensioners and seven named military personnel who were plaintiffs below, on their own behalf and on behalf of all others similarly situated, hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit on petitioners' petition for rehearing (App. C *infra* at 29a) is unpublished. Its original opinion (App. A *infra* at 1a) is reported at 937 F.2d 965. The opinion of the United States District Court for the Eastern District of North Carolina (App. B *infra* at 17a) is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion reversing the district court's rejection of the qualified immunity defense asserted by respondent Powers, the former North Carolina Secretary of Revenue. App. A at 1a. Petitioners' timely petition for rehearing was denied on July 22, 1991. App. C at 29a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n] or shall any State deprive any person of life, liberty, or property, without due process of law . . .

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or *compensation* for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or *compensation*. [Emphasis added.]

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

STATEMENT

Introduction. For many years before 1989, North Carolina taxed retirees from federal government jobs (class A plaintiffs-petitioners) on all but $3,000 of their federal pensions while entirely exempting pensions of state and local government retirees. Similarly, until 1990, members of the North Carolina National Guard received an income tax exemption of $1,500 per year while their federal counterparts in the federal active duty and military reserve (class B plaintiffs-petitioners) received no exemption. The taxation of federal pensions and compensation in such discriminatory fashion violated the requirement of equal taxation of governmental employees by the states, as imposed both by the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. *Davis v. Michigan*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (March 28, 1989).

This is an action against North Carolina's chief tax collector and enforcement official for damages caused by violation of federal constitutional and statutory rights of petitioners. The damages are the amount of state income taxes illegally collected from petitioner class members. Petitioners have brought a parallel state court tax refund action which has been dismissed by the North Carolina Supreme Court.* Absent reversal of that dis-

* Petitioners have also brought a class action for tax refunds pursuant to state refund statutes. *Swanson v. State of North Carolina, et al.*, No. 64PA91. In that action the North Carolina Supreme Court recently reversed the trial court's award of refunds, plus interest, under the normal three-year refund statute on the ground

missal, this action is the only remedy for petitioners. Respondent asserted as a defense qualified immunity, which the district court rejected but the Fourth Circuit accepted.

Pre-Davis Facts Showing Respondent Knew or Should Have Known that Pensioners Were Being Illegally Taxed. Certain factual matters going back for many years prior to this Court's decision in *Davis* offer pertinent background regarding the issues here posed. In addition, an extensive record of approximately 78 evidentiary materials and several deposition transcripts and other discovery answers was compiled and submitted to both the district and appellate courts below. This record established the following: (1) Respondent produced in discovery a 1940 North Carolina Attorney General Memorandum to the then Commissioner of Revenue which explained that by 4 U.S.C. § 111 the federal government consented to North Carolina income tax on federal compensation only so long as it was not discriminatory.[1] In the following year, the state retirement statutes were revised to provide tax exemptions for state pensioners. 1941 N.C. Sess. Laws, Ch. 25, § 9. A 1941 N.C. Law Review article noted specifically that the new state government pensioners' tax exemption was suspect be-

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that *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1973), barred retroactive application of the *Davis* decision and that this Court's decision in *Beam v. Georgia*, —— U.S. ——, 111 S.Ct. 2439 (June 20, 1991), was irrelevant to an application of the *Chevron* defense. Petitioners currently are awaiting a decision of the North Carolina Supreme Court on their petition for rehearing on that ruling.

In any event, there can be no double recovery as a result of the instant action and the state court refund action because to the extent refunds are recovered pursuant to state refund statutes, damages here are reduced. In addition, any damages awarded to petitioners from respondent should be paid by the State of North Carolina under the mandatory indemnification provisions of N.C.G.S. § 143-300.6; *cf. Griess v. Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988).

[1] App. B at 26a-27a.

cause other pensioners did not get exemptions. 19 N.C. L. Rev. 435, 591 (1941). The next year, the North Carolina Supreme Court specifically ruled that retirement benefits constituted deferred "compensation." *Bridges v. Charlotte*, 221 N.C. 472, 482, 20 S.E.2d 825, 832 (1942). (2) Petitioners' evidence showed that, although no single individual pensioner had sued for a tax refund,[2] federal retirees complained of the discriminatory taxation to state and revenue officials since, at least, 1979.[3] (3) The 1987-89 Tax Fairness Study Commission of the North Carolina General Assembly reported on January 11, 1989 that "*existing law allows some retirees a full income tax exclusion for retirement pay, but other retirees receive no exclusion. This discrimination is not based on ability to pay or any other standard of fairness.*"[4] (4) Revenue officials testified that they knew for years of the discriminatory treatment.[5] (5) In addition, numerous state employee retirement handbooks showed that the State viewed retirement benefits as deferred "compensation."[6] Moreover, it has long been settled that the federal government views retirement benefits as compensation for past serv-

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[2] It is unlikely that a single individual pensioner would have deemed it economically practicable to sue respondent for a tax refund given the amount at stake and the expense involved in recovering it. The taxpayer in *Davis*, Mr. Paul Davis, appears to be the first federal pensioner to pursue the matter through the courts and it took him several years and, finally, an appearance in this Court before he was successful in recovering the monies unconstitutionally taken from him. *See also, Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986) (federal pensioners' action on grounds of intergovernmental tax immunity and 4 U.S.C. § 111 dismissed under Tax Injunction Act, 28 U.S.C. § 1341).

[3] J.A. 349-408. All cites to the parties' joint appendix in the appellate court below, which comprise the record in this case, are provided for this Court's convenience.

[4] App. B at 27a; JA 320.

[5] JA 675, 685-87.

[6] JA 623-28.

ices rendered. *See* I.T. 1607, II-1 C.B. 71 (1923); I.T. 2669, XII C.B. 68 (1933); Rev. Rul. 56-82, 1956-1 C.D. 59; Rev. Rul. 57-75, 1957-1, C.B. 28. (6) Respondent entered into agreements with the U.S. Treasury Department and received withholdings on federal pension payments pursuant to a state statute authorizing income taxes on "wages" of federal employees.[7] N.C.G.S. § 105-163.23. (7) Respondent and her officials took "no position" when asked to critique proposed pre-*Davis* legislation to equalize governmental pension taxation consistent with the Tax Fairness Study Commission Report. Their critique simply stated that the administration should consider whether to oppose or support the proposed legislation because it would impact heavily on state employees.[8] Respondent refused to take any position on the proposed repeal of the discriminatory taxation despite the fact that she was specifically charged by various statutes to make thorough study and report to the General Assembly on income taxation laws, including comparison between state and federal taxation. App. B at 26a. *See also* N.C.G.S. §§ 143B-218, 143B-219, 147-88, 105-257 and 105-153. (8) That a majority of states did not have such discriminatory taxing schemes, *Davis*, 489 U.S. 803, 109 S.Ct. at 1511-12, 103 L.Ed.2d at 909 (Stevens, J., dissenting), may be evidence of their knowledge of the illegality of discrimination. (9) Respondent possessed since July 1988 a detailed two-page report from the Federation of Tax Administrators addressing the issues posed in *Davis*, then pending before this Court. App. B at 27a.

Post-Davis Facts Showing Respondent's Actions Denied Due Process to Petitioners. After the March 28, 1989 *Davis* decision, respondent consumed 16 of 20 days remaining until the April 17, 1989 due date for 1988 individual income tax returns before implementing a plan to respond to complaining retiree taxpayers and accountants

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[7] App. B at 27a.

[8] JA 331.

regarding refunds of 1988 taxes already paid and about to be paid. Belatedly, on April 13, 1989, she made a one-time press release, stating that retirees should report and pay tax on their 1988 retirement benefits and seek refund which would be granted only by filing demand within 30 days of payment.[9] This position followed an April 10, 1989 opinion to the Department by the Special Deputy Attorney General assigned to and located in respondent's Department stating that, like Michigan, North Carolina's tax on federal pensions was unconstitutional, but no refunds should be made unless taxpayers made written refund demands within 30 days of payment under N.C.G.S. § 105-267.[10]

All evidence before the district court demonstrated this was the first time such a 30-day policy had been applied to individual North Carolina taxpayers and that respondent did not even have an established means by which to effectively administer it by determining when "payment was made" of income taxes. Further, respondent did nothing else to notify federal retirees of their admitted rights to refunds, but continued to collect unconstitutional tax monies for 1988 and tried to apply the newly announced 30-day statute of limitations. As of February 1990, respondent had refunded taxes illegally collected on federal pensions only for 1988 and only to 12,404 of the approximately 100,000 federal retirees paying income tax in North Carolina. Respondent denied 1988 refunds to 9,627 federal retirees whose individual demands she considered untimely under the 30-day rule. The remaining approximately 80,000 federal retirees did not make claims apart from the class demand, discussed below.

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[9] App. B at 22a; JA 211.

[10] JA 411-14. The Special Deputy's opinion was based, in part, on a 1977 decision of the North Carolina Supreme Court in *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977), in which the court ruled that a corporate taxpayer's refund suit for unconstitutional crown taxes could be brought only under N.C.G.S. § 105-267.

Contrary to the Attorney General opinion, the generally accepted source of direction and advice as to how and when to obtain refunds was contained in respondent's generally distributed tax publications. Instruction booklets accompanying individual income tax returns that were published and distributed by respondent and her revenue officials since 1985 (and most likely before then) all stated clearly that any refund demand could be made within *three years* of the due date (April 15) of the tax year in question. Likewise, "Individual Income Tax Bulletins" for 1985-1986 and 1987-1988, published by respondent for the purpose of explaining the administrative interpretation and application of state income tax laws relating to individual taxpayers, advised taxpayers they had *three years* from the return due date within which to seek refunds. Every single reference in the North Carolina Administrative Code (the official codification of state agency rules) regarding refunds of individual income taxes advised taxpayers they had three years from the return due date within which to claim a refund. None of the foregoing publications mentions the 30-day rule.[11]

Very soon after the *Davis* decision was released and prior to the April 13, 1989 press release, respondent's Individual Income Tax Division Director advised the Executive Director of the North Carolina Association of Certified Public Accountants (NCACPA) that federal pensioners had until April 17, 1989 to file protective claims for refunds of taxes paid for the past *three years*, which would include tax year 1985.[12] At no time did the Director mention the yet undiscovered 30-day limitation period of N.C.G.S. § 105-267. On April 4, 1989, the NCACPA distributed a memorandum memorializing the Director's advice to members of that Association throughout the State.[13] Relying on that memorandum, one accountant

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[11] JA 154-210.

[12] JA 415-23.

[13] JA 417.

reported that she believed the three-year limitation period controlled, until September 1989 when she learned of the 30-day rule.[14] There was abundant evidence that numerous other CPA's and taxpayers received similar advice from Revenue officials or relied upon Revenue's publications to the same effect.

Further, in his April 4, 1989 memorandum to all Revenue officers, field auditors and income tax personnel throughout the State, respondent's Individual Income Tax Division Director advised that "*filing an amended return [which is governed by the three-year statute of limitations], would protect [a federal retiree taxpayer's] right to any refund if ultimately it is determined that a refund is required as a result of the* Davis *decision.*" [15] No mention of a 30-day limitation was made. The next day, the Director made a written request to the Special Deputy Attorney General regarding the effect of *Davis*.[16]

On April 12, 1989, and after the Special Deputy Attorney General released his official Attorney General opinion, the Director changed his advice to Revenue officials, stating that no refunds would be made unless taxpayers

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[14] JA 420-422.

[15] JA 493.

[16] JA 494. There was also evidence that very soon after *Davis*, respondent and her Deputy Secretary discussed that decision's impact on federal pensioners in North Carolina and the effect of the *Coca-Cola* decision, in which the Deputy Secretary was defense counsel, to federal pensioners' anticipated refund claims. (JA 1189-90; 1200-04, 1213.) It is apparent they agreed to attempt to utilize the 30-day rule in response to *Davis*, in contrast to their publications and customary practice. On March 30, 1989, the Deputy Secretary met with the Director and the Special Deputy Attorney General at which time the Deputy Secretary orally requested the Special Deputy Attorney General to provide an opinion for their treatment of retiree taxpayers. (JA 1091, 727-29, 1200-04, 1213-14, 1236.) Respondent acknowledged during her deposition and in memoranda she wrote to state officials that she was fully aware of the 30-day mechanism and *Coca-Cola* prior to the April 10, 1989 Attorney General opinion. (JA 1213-14, 1323.)

met the newly announced 30-day requirement.[17] The Director further advised that taxpayers who had not yet paid taxes should be told "not [to] include the benefits on their return." On April 13, 1989, respondent distributed her one-time press release to the same effect, but unlike the Director, she did not advise retirees who had not paid taxes that they could exclude them from their payments.[18]

Respondent's press release was contrary to a personal letter written on April 11, 1989 to respondent by the Attorney General himself in which he characterized her application of the 30-day rule as "unfair" and stated that it may be "more fair to permit recovery of taxes paid over the past three years." (April 11, 1989 correspondence of Attorney General Thornburg to respondent Powers supplemented to the record by the district court's order of July 2, 1991.)[19]

Following respondent's press release, her treatment of federal retirees seeking refunds was inconsistent, arbitrary and capricious. Petitioners introduced several affidavits regarding individual taxpayer situations illustrative of respondent's inconsistent and arbitrary handling of refund claims: pay 1988 taxes under threat of heavy

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[17] JA 495.

[18] JA 211-12. The first draft of the April 13, 1989 press release, prepared by Hodges, did include a statement that retirees who had not yet paid 1988 taxes need not include the retirement benefits in their reportable income.

[19] On that same date, Attorney General Lacy Thornburg stated publicly that, "We not only concede, we fully agree *this is particularly unfair* as to those persons who conscientiously got upfront and paid their taxes earlier on and are now seeking those who didn't come in and file request for a refund." (JA 499-500.) Thornburg's admission of unfairness understates the case in light of the inconsistent advice being given by revenue officials, the plain language of revenue publications providing a three-year limitations period, and the fact that respondent had no established means to effectively administer her own nowly-announced practice.

penalties,[20] do nothing,[21] do not pay 1989 estimated taxes,[22] pay 1989 estimated taxes,[23] amended returns lost,[24] inadequate guidance and information,[25] different treatment within the same year,[26] improper denials of refund demands claimed within 30-day rule both before and after *Davis*,[27] initially denied, but later refunded on re-demand as within 30-day rule,[28] refund granted though outside 30-day rule, and failure to date-stamp receipt of returns until April 15.[29]

Obviously, respondent had never before applied the new 30-day rule under such circumstances. In discovery answers, respondent contended the 30-day demand period, unlike the normal three-year demand period, begins to run from "date of payment," and that payment occurs when the return is filed or delivered to the Postal Service for delivery.[30] But in determining when the 30-day demand period began to run on claims of federal retirees for 1988, respondent simply resorted to the date the taxpayer signed his return.[31] She had no method of date-stamping returns filed prior to April 15 and there was not an effective means for establishing when taxpayers "filed" their returns or "delivered" returns to the Postal Service. Respondent's practice was to destroy or discard the taxpayer's envelope upon receipt so she could not even use the mailing date.[32] Thus, if a taxpayer signed a return on

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[20] JA 501-05.

[21] JA 476-77.

[22] JA 506-10.

[23] JA 511-24.

[24] JA 501-05, 525-31.

[25] JA 532-49.

[26] JA 431, 468-75, 550-51.

[27] JA 525-31, 552-75.

[28] JA 478-83, 576-94.

[29] JA 569-75, 595-601, 806-07, 1434-35.

[30] JA 603.

[31] App. B at 22a.

[32] JA 806-07.

January 10 but did not put it in the mail until April 14 and he demanded refund on April 15 he was out of time. Respondent's 30-day policy formulated and announced after *Davis* not only penalized early filers, but because of her inability to determine when returns were actually filed, also penalized those retirees who actually made timely demands, even under the new rule imposed just four days before the 1988 tax deadline.

The inequitable result of the 30-day rule is clearly evidenced in Sec. 1 of proposed HB 1350 [33] for the 1989 session, drafted by respondent's own counsel, the Special Deputy Attorney General, stating that the

> General Assembly finds that *numerous groups of federal retirees were unaware of the* Davis *decision until 30 days had elapsed since their payment of taxes upon retirement income, or were otherwise unable to comply with the 30-day demand requirement of N.C.G.S. 105-267.* Therefore, in order to allow more time for taxpayers to demand refunds of taxes paid, the General Assembly desires to amend the provisions of N.C. G.S. 105-267 and ensure that *Davis* be extended to as many federal retirees as reasonably practicable.

(Emphasis added.) This proposed bill was not enacted.

On April 14, 1989, and supplemented on April 18, 1989, petitioners' counsel, on behalf of all class A members, made written demand to respondent for refunds for all tax years for which the filing date fell within three years of that date, 1985 through 1988, pursuant to an order of conditional class certification entered by the district court for the express purpose of authorizing class counsel to make class demand for refund to respondent.[34]

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[33] JA 605-09.

[34] JA 227-36, 246-53. The order of conditional class certification was granted on 14 April 1989, when federal retirees filed a complaint in federal court challenging respondent's discriminatory taxing

Respondent never opposed class certification in this action. On July 11, 1989, respondent denied petitioners' class A refund demand solely on the ground of alleged lack of names, social security numbers and specific tax information of class members not specifically named.[35] The refund statute itself makes no such requirements and revenue officials testified that "as long as we could identify the taxpayer and they were requesting refund of taxes paid, then we would consider that a claim." [36] Further, unrefuted evidence showed that respondent's Department had in its possession or had access to information needed to determine the identity and refunds of all class A members either civil service retirees or military retirees. Since April 26, 1989, respondent had computer tapes obtained from the United States Government which listed 41,960 federal civil service retirees residing in North Carolina, their addresses and federal retirement pay record information.[37] Federal officials reported that, as of December 31, 1989, 47,851 military retirees receiving retirement pay resided in North Carolina.[38] Respondent had access to similar pay records and computer data from the United States Government as to all military retirees.[39] Respondent refused to take any steps, except under court order, to obtain this individualized information available to her since before this action was commenced, although evidence showed that several other states' revenue officials have taken advantage of United States Government informational resources

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scheme under 42 U.S.C. § 1983. On 24 July 1989, without objection by respondent, the district court entered a final order certifying plaintiffs' action as a class action.

[35] JA 237-38.

[36] JA 797.

[37] JA 239-42.

[38] JA 245.

[39] JA 243-44.

since *Davis* was announced for the very purpose of identifying affected taxpayers and calculating refunds.[40]

On August 12, 1989, the General Assembly repealed the exemption for state pensions retroactively effective January 1, 1989, thus equalizing tax treatment of state and federal retirees in class A. 1989 N.C. Sess. Laws, Ch. 792. Finally, several months after this action was filed, the General Assembly enacted a tax credit, N.C.G.S. § 105-151.20, that might be utilized by some class A members who were not quick enough to obtain a 1988 refund due to the haphazard application of the 30-day rule described above. Under the credit statute, class A members are allowed to compute the tax illegally collected from them in 1988 only and claim one third of that amount as a tax credit for each of tax years 1990, 1991 and 1992, without interest, and only if the taxpayer is alive and to the extent he owes taxes in those years. App. B at 23a-24a, nn. 3, 4. The district court characterized this credit statute as an admission of wrongdoing, a possible ongoing constitutional violation and inadequate to provide relief to petitioners. App. B at 23a-24a, nn. 3, 4.

On February 2, 1990, the district court allowed petitioners' second amended complaint adding members of the federal active duty and military reserve as class B plaintiffs to the previously certified class action. On March 12, 1990, class counsel delivered to respondent a refund demand on behalf of class B for tax years 1986-1989.[41] As with class A, federal officials reported that, as of December 31, 1989, 49,486 active duty and military reserve personnel of class B resided in North Carolina, and that pay record information on them was available to respondent.[42] Effective January 1, 1990, the General Assembly repealed the National Guard exemption, thus equalizing the treatment of Class B. 1989 N.C. Sess. Laws, Ch. 1002 (1990).

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[40] JA 243-44.

[41] JA 246-53.

[42] JA 243-44.

REASONS FOR GRANTING THE WRIT

This case presents, first, the question of whether discriminatory state income taxation of more than 100,000 federal pensioners and nearly 50,000 federal military personnel residing in North Carolina violated their clearly established rights under the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. § 111 before this Court handed down its March 28, 1989 opinion in *Davis*. If it did not, then respondent's qualified immunity defense was properly allowed by the appellate court below. The opinion of this Court in *Davis*, however, clearly showed that pensioners' rights were clearly established and this Court should grant the writ to enforce those rights.

This petition also presents the question of whether state revenue officials charged with enforcing state taxing statutes may avoid personal responsibility when those statutes are plainly inconsistent with the United States Constitution and federal statutes. In such cases, revenue officials should not be allowed to hide behind legislative enactments which they contend to be "presumptively valid," despite the fact that a conscientious evaluation of the statutory scheme would negate any such presumptuousness.

This Court is familiar with the number of federal pensioners' suits for the recovery of unconstitutional taxes initiated since *Davis* and the obstacles imposed against pensioners by state revenuers and even state courts of last resort in their efforts to recover the unconstitutionally collected monies. *See*, *Bass v. South Carolina*, 395 S.E.2d 171 (S.C. 1990), *vacated*, —— U.S. ——, 111 S.Ct. 1881 (June 28, 1991); *Harper v. Virginia Dept. of Taxation*, 401 S.E.2d 868 (Va.), *vacated*, —— U.S. ——, 111 S.Ct. 2883 (June 28, 1991); *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *pet. for cert. filed*, S. Ct. No. 91-457, Sept. 16, 1991; *Pledger v. Bosnick*, 811 S.W.2d 286; *pet. for cert. filed*, S. Ct. No. 91-375 (1991); *Hogan*

v. Musolf, 471 N.W.2d 216 (Wisc. 1991), *pet. for cert. filed*, S. Ct. No. 91-380, Sept. 5, 1991; *Barker v. State of Kansas*, 249 Kan. 186 (1991), pet. for *cert. filed*, S. Ct. No. 91-611, Oct. 10, 1991; *Hackman v. Dir. of Revenue*, 771 S.W.2d 77 (Mo. *en banc* 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 718 (1990). Without the intervention by this Court, the rights of these petitioners, and hundreds of thousands of others similarly situated throughout the nation, are jeopardized and, in many cases, altogether lost if left in the hands of state officials and courts whose interests are too parochially tied to the local stakes involved and not fairly objective toward the plight of federal retirees.

Finally, this petition seeks redress for North Carolina's highest revenue official's failure to provide an adequate post-deprivation remedy from unconstitutional taxation as required by the Due Process Clause and the principles recently enunciated by this Court in *McKesson Corp. v. Florida Alcohol and Tobacco Div.*, —— U.S. ——, 110 S.Ct. 2238 (1990). As the pressure on state and local government revenuers to generate and collect revenues increases and the federal government decreases its past subsidization of such revenues, individual taxpayers are and will be faced with more frequent novel and constitutionally impermissible taxing statutes. Without enforcement of adequate post-deprivation procedures to recover such illegally collected monies, taxpayers' confidence and trust in revenue agencies will fail and lead to more severe and long-term damage to society as a whole.

Petitioners submit that this case is an appropriate case in which to resolve these important questions.

I. THE COURT BELOW ERRONEOUSLY CONCLUDED THAT THE RIGHTS OF FEDERAL PENSIONERS AND MILITARY PERSONNEL AGAINST DISCRIMINATORY TAXATION AS PRESCRIBED BY 4 U.S.C. § 111 AND THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY WERE NOT CLEARLY ESTABLISHED SINCE, AT LEAST, 1985.

A. Federal Pensioners.

The constitutional principle of intergovernmental tax immunity—that a state may not tax one who deals with the federal government less favorably than one who similarly deals with the state government—was well established long before *Davis*. Indeed, the holding in *Davis*, as pointed out by the district court, was "inevitable." App. B at 26a. Further, that the doctrine applies to all types of taxes (property taxes, use taxes, income taxes, etc.) and all types of taxpayers (government employees, lessees, agents, contractors, users of government services, etc.), so long as the tax relates to the taxpayer's relationship with the government (such as a tax on payments from the federal government), was likewise clearly established prior to *Davis*. Equally established was the statutory principle that a person whose compensation comes from having rendered services as an employee or officer of the United States can only be taxed by a state if the tax is nondiscriminatory.[43]

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[43] The following brief chronological survey reveals the well established precedent relevant to both the doctrine of intergovermental tax immunity and 4 U.S.C. § 111 prior to the *Davis* decision: (1) *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) (state tax on federal bank invalid on intergovernmental tax immunity grounds, which is rooted in principles of supremacy and federalism); (2) *Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 435, 10 L.Ed. 1022 (1842) (state may not tax income of federal officers); (3) *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1871) (federal government may not tax salary of state judge); (4) *Purnell v. Page*, 133 N.C. 125, 126, 45 S.E. 534 (1903) (holding that it was "so well settled by the highest Federal Court that no state can tax the compensation allowed by the Federal Government to its officers

Following the clear precedent that a tax which treats those who deal with the federal government less favorably than those who deal with state government is discrimina-

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that it had not been thought that the point could again be raised"); (5) 1937 N.C. Sess. Laws, Ch. 127, § 317, ¶ 2(e) (excludes from "gross income" compensation received by federal employees and military personnel); (6) *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937) (beginning of "modern" line of intergovernmental tax immunity cases, holding valid a West Virginia gross receipts tax upon contractors who dealt with the federal government on ground that tax applied equally to contractors who dealt with state government and, thus, was *not discriminatory*); (7) *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938) (federal income tax on state employees valid so long as such taxation was not discriminatory); (8) *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939) (state income tax on federal employees valid because nondiscriminatory); (9) Public Salary Tax Act of 1939, 53 Stat. 575, codified, as amended, at 4 U.S.C. § 111, consenting to *nondiscriminatory* taxation of federal employees; partial codification of then modern line United States Supreme Court cases on intergovernmental tax immunity doctrine); (10) 1939 N.C. Sess. Laws, Ch. 158, § 317, ¶ 1, (following 4 U.S.C. § 111), includes in "gross income" the income of state employees and compensation received by federal employees and military personnel *so long as* also taxed by federal government; (11) *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946) (nondiscriminatory federal tax on mineral waters held valid); (12) *United States v. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958) (state property tax on private parties who used tax exempt property in for-profit business held valid because nondiscriminatory—the tax applied to all private parties conducting business for gain on exempt property, whether owned by federal or state government); (13) *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 78 S.Ct. 458 (1958) (state personal property tax on federal government contractor making aircraft parts for federal government held valid because nondiscriminatory—tax applied equally to all such property regardless of who owned it); (14) *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960) (state property tax assessed against private lessees of federal land, but exempting from tax private lessees of state owned land, held invalid discrimination—relying on intergovernmental immunity and *M'Culloch*; (15) *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d (1961) (held unconstitutional a Washington State tax or cer-

tory and unconstitutional, in 1989 this Court decided *Davis*, reaching the predictable and obvious conclusion that Michigan's discriminatory taxing scheme against federal pensioners was unconstitutional. In making explicit that its decision simply recognized clearly established rights and was in keeping with its rulings in prior tax immunity cases, this Court noted that, "*the nondiscrimination component of the constitutional immunity doctrine . . . has, from the time of M'Culloch v. Maryland, barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'*" 109 S.Ct. at 1506 (emphasis added). This Court characterized the doctrine of intergovernmental tax immunity as a "*settled rule*" and its meaning, as codified in 4 U.S.C. § 111, as "*unmistakable*"; stated "*[a]ny other interpretation of the nondiscrimination clause is implausible at best*"; and criticized "*the state's [Michigan's] hypertechnical reading*" of the statute. The Court went on to refute Michigan's argument that intergovernmental tax immunity was not applicable, stating that "*all precedent is to the contrary.*" 109 S.Ct. at 1504-05, 1507 (emphasis added). *Davis*' was simply one more application of the clearly established constitutional principle that discriminatory taxes are unconstitutional.

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tain federal leaseholds); (16) *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 688 (1977) (state use/property tax assessed against improvements and personal property of federal employees living on federal land held valid because nondiscriminatory—tax applied equally to federal employees living on federal land and state employees living on state land); (17) *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978) (federal registration tax on state owned aircraft valid as nondiscriminatory—the tax applied not only to state owned aircraft but also to federally owned aircraft; (18) *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (congressional repeal of federal tax exemption for "unregistered" long-term bonds held valid as nondiscriminatory—repeal of exemption applied equally to all unregistered bonds, whether issued by state or federal government or private companies).

It is against this background of current law and the undisputed facts of respondent's actions as set forth above that the qualified immunity standard is to be applied. Under this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 801, 102 S.Ct. 2727, 2729, 73 L.E.2d 396-398 (1982), government officials are only immune from liability for civil damages so long as their conduct "does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." Further, in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), this Court wrote that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531. Under this "objective (albeit fact-specific) question," officials are not entitled to immunity unless "their actions are reasonable in light of current American law." *Id.* at 3040, 3042.

Thus, a right can be clearly established if the general well-developed legal principles applicable to analogous (but not identical) factual situations would lead a person charged with knowledge of these principles to the conclusion that the right existed. *See Hicks v. Feeny*, 770 F.2d 375 (3d Cir. 1085); *Brady v. Gebbie*, 859 F.2d 1545, 1556-57 (9th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1577, 103 L.E.2d 943 (1989) (several facets of existing law, when considered together, would suggest that unlawfulness of defendant's conduct was apparent).

The court below determined that the rule of law regarding unconstitutional state taxation of federal pen-

sioners was not clearly established prior to *Davis*. App. A at 5a. In reaching this conclusion, the court noted that respondent was enforcing a long-standing tax scheme that was similar to enactments in other states and that had gone unchallenged in North Carolina for nearly fifty years. App. A at 6a-7a. Such a comparison, however, does not justify violation of constitutional and congressional mandates, regardless of the number of states involved. *See South Carolina v. Baker*, 485 U.S. 505, 515, 108 S.Ct. 1355, 1362, 99 L.Ed. 2d 592.

In line with the State of Michigan's position in *Davis*, which this Court characterized as "hypertechnical," the court below also adopted the argument of respondent that it was not clear that 4 U.S.C. § 111 applied to federal retirees' retirement compensation. App. A at 11a-12a. This conclusion is erroneous. In the first facet of its decision, this Court in *Davis* had "*no difficulty in concluding that civil service retirement benefits are deferred compensation*. . . ." 109 S.Ct. at 1504. Further, it has been well-settled in North Carolina for a least half a century that retirement benefits are deferred compensation. *Bridges v. Charlotte*, 221 N.C. 472, 482, 20 S.E.2d 825, 832 (1942); *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962); *Harrill v. Teachers' and State Employees' Retirement System*, 271 N.C. 357, 363, 156 S.E.2d 702, 707-08 (1967); *Simpson v. Retirement System*, 88 N.C. App. 218, 223, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

Indeed, the district court judge stated in response to respondent's argument:

> The *Davis* Court, however, found it obvious that retirement benefits were compensation. 109 S.Ct. at 1504. Moreover, it has been long-settled in North Carolina that retirement benefits are compensation. [Citations omitted.] *Indeed, the defendant received withholdings on federal retirement benefits pursuant to a state statute authorizing income taxes from "wages" of federal employees.* N.C.G.S. § 105-163.23.

App. B at 27a. (Emphasis added.)

The court below also discussed its belief that simply because this Court wrote about the issue in *Davis* then "presumably [this] Court would not [have] squandered its limited resources on an issue that was clearly established." App. A at 11a. This reasoning overlooks the simple fact that the practice of this Court in taking such cases as *Davis* may not at all be related to the clarity of the law in question, but rather, by necessity, for the enforcement of federal constitutional and statutory rights which state courts of last resort have refused to enforce for whatever reason. The court further noted that enforcement of a "presumptively valid statute" indicates objectively reasonable conduct. App. A at 7a-8a. As demonstrated above, however, since at least 1985 (and longer), there has been nothing "presumptively" valid about the unconstitutional taxing scheme enforced by respondent. Moreover, the facts discussed at pages 4-6 above, including the pre-*Davis* Tax Study Commission Report which labeled pension taxation as "discriminatory," show that respondent either knew or should have known of petitioners' rights against such illegal taxation.

B. Active Duty and Reserve Military Personnel.

The court below also held that because the federal government compensates members of state national guard units, then it is at least arguable that an exemption "solely for state national guard personnel creates no federal statutory or constitutional violation." App. A at 16a. This conclusion misses the point entirely. N.C.G.S. § 127A-3 defines the National Guard as a component of state government. This Court recently held in *Perpich v. Dept. of Defense*, —— U.S. ——, 110 S.Ct. 2418, 2425, 110 L.Ed.2d 312, 58 U.S.L.W. 4750 (1990), that "*unless and until ordered to active duty in the Army [in the case of a national emergency], they [National Guard personnel] retained their status as members of a separate state Guard unit.*" (Emphasis added.)

On 20 July 1990, the General Assembly enacted SB 1084, appropriately entitled "AN ACT TO CONFORM THE LAWS OF NORTH CAROLINA TO THE REQUIREMENTS OF CERTAIN FEDERAL LAWS AND CONSTITUTIONAL PRINCIPLES." 1989 N.C. Sess. Laws, Ch. 1002 (1990). It repealed the $1,500 annual income tax exemption for pay to North Carolina National Guard members which had been in effect since 1979. No such exemption had existed for federal active duty and military reserve personnel. *Because class B plaintiffs-petitioners are employees of federal military forces rather than the State National Guard, they received less favorable tax treatment.* As the General Assembly's title of the repealing statute states, the repealed exemption violated both intergovernmental tax immunity and 4 U.S.C. § 111. After *Davis* and up to the time of its repeal, respondent never evaluated the illegality of the discriminatory exemption, despite the fact that her Deputy Secretary testified almost a year before its repeal that "it [was] something that would merit looking at." [44]

Further, under 4 U.S.C. § 111, as contrasted with the doctrine of intergovernmental tax immunity, any discrimination by a state in the taxation of federal employees, even among federal employees (i.e., Army vs. Navy), is forbidden.[45] The district court implicitly found such discriminatory taxation when it noted in its order (denying respondents' motion to dismiss) that the credit statute enacted in 1990 purporting to allow class A plaintiffs-petitioners a remedy "provides no remedy to the Class B Plaintiffs." App. B at 23a. This conclusion is obviously correct since the National Guard occupies the same posi-

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[44] JA 732-34.

[45] 4 U.S.C. § 111 provides as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority have jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

tion with respect to state government as the federal military occupies with respect to federal government.

Respondent's only contention, and the basis for decision by the court below, regarding this obvious discrimination is that because North Carolina National Guard personnel were compensated by both the state and federal governments, there was no discrimination on a "source of compensation" basis. This conclusion, premised only upon the language of 4 U.S.C. § 111 and in disregard of intergovernment tax immunity, misses the point entirely because it is not the source of compensation of the favorably treated group that matters. When the disfavored group, class B plaintiffs-petitioners, are paid, controlled by and solely subservient to the federal government, a discrimination exists if the favored group clearly has a closer connection to the State.

Here the National Guard had a much closer connection with the State. It is established by state law and normally is under state control. If the General Assembly had not thought that the State National Guard was the State's own, as contrasted to federal military services, surely it would never have enacted the exemption. Respondent cannot in good faith deny that the $1,500 exemption constituted a form of compensation to Guard personnel for remaining available for State emergency service, and it served to attract persons interested in serving in the military reserves to choose the North Carolina National Guard. The necessary implication is that it cast federal service in an unfavorable light. Therefore, the court below erroneously allowed the defense of qualified immunity.

II. THE COURT BELOW FAILED TO RECOGNIZE THAT RESPONDENT VIOLATED PETITIONERS' CLEARLY ESTABLISHED RIGHTS TO AN ADEQUATE POST-DEPRIVATION REMEDY FOR UNCONSTITUTIONAL STATE TAXATION BY IMPOSING JUST FOUR DAYS BEFORE THE TAX DEADLINE AN UNWORKABLE 30-DAY STATUTE OF LIMITATIONS WITHIN WHICH TO DEMAND REFUNDS THAT SHE COULD NOT EVEN ADMINISTER AND WHICH WAS CONTRARY TO ALL HER DEPARTMENT'S PREVIOUS OFFICIAL PUBLICATIONS, TAX INSTRUCTION BOOKLETS, ADMINISTRATIVE REGULATIONS AND OFFICIAL ADVICE.

This Court in *McKesson* stated that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." The *McKesson* decision relied heavily upon the legal principles previously set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.E.2d 18 (1976), where this Court stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner. . . .'" *McKesson*, 110 S.Ct. at 2251 n.22, *quoting Mathews*, 424 U.S. at 333, 96 S.Ct. at 902.

In addressing the issue of whether a state refund remedy for past unconstitutional taxation was adequate, this Court held that the state must provide meaningful backward-looking relief to rectify an unconstitutional deprivation and that the refund remedy must be clear, certain and meaningful.

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, *the Due Process Clause of*

> *the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.*
>
> * * * *
>
> To satisfy the requirements of the Due Process Clause . . . *the state must provide taxpayers with*, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "*clear and certain remedy*," for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a *meaningful* one.

McKesson, 10 S.Ct. at 2247, 2251 (emphasis added).[46]

Under N.C.G.S. § 105-264, respondent had the duty to construe the tax laws of the State. Even an opinion of the

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[46] In *McKesson* this Court observed that when a tax is "beyond the State's power to impose" then the State has "no choice but to 'undo' the unlawful deprivation by refunding the tax. . . ." 110 S.Ct. at 2251. Further, prior decisions of this Court indicate that discriminatory state tax schemes which violate intergovernmental tax immunity are beyond a state's power to impose. In *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 370, 80 S.Ct. 474, this Court held that such taxes "may not be exacted." 361 U.S. at 387. In *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, this Court held that the tax was "void." 365 U.S. at 752.

This is consistent with the equitable principle underlying tax refund statutes in general. As one state supreme court recognized,

> An honorable government would not keep taxes to which it is not entitled . . . .

Pittsburgh and Midway Coal Mining Co. v. Dept. of Revenue, 776 P.2d 1061 (Ariz. 1989) (emphasis added). In a similar context, this Court stated that when the federal government abolished the protest requirement of earlier tax refund statutes, it recognized that it would be

> unjustly enriched when it held on to moneys that had been illegally collected, whether with protest or without . . . . A high-minded government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience . . . . A fine sense of honor had brought the statute into being.

Moore Ice Cream Co. v. Rose, 289 U.S. 373, 378-79, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1938) (emphasis added).

Attorney General to her is advisory only. *In re Assessment of Taxes (Virginia-Carolina Chemical Corp.)*, 248 N.C. 531, 538, 103 S.E.2d 623 (1958). By this same statute, taxpayers are entitled to rely on respondent's published construction of revenue laws. The statute provides in pertinent part, that

> [w]henever the Secretary of Revenue shall construe any provisions of the revenue laws . . . and shall issue or publish to taxpayers in writing any regulation or ruling so construing the effect or operation of any such laws, such ruling or regulation shall be a protection to the . . . taxpayers affected thereby and *taxpayers shall be entitled to rely upon such regulation or ruling.*

N.C.G.S. § 105-264. (Emphasis added.)

The appellate court below ruled that respondent's imposing of the unadministrable 30-day refund statute was based on a valid state statute and good faith advice from the state attorney general. App. A at 14a. First, the appellate court failed to address the fact that before respondent made her press release announcing her treatment of petitioners' refund claims under the 30-day rule, the Attorney General himself wrote her in objection because of the plain unfairness that would result upon pensioners, and stating that the normal three-year rule was more appropriate. (Although not produced by respondent in discovery as requested, petitioners obtained the Attorney General's letter after initial briefs and arguments to the court below, but furnished it as supplement to the record in their petition for rehearing which was denied on July 22, 1991. App. C, at 29a.)

More importantly, the appellate court below failed to take into consideration the undisputed facts that: (1) Respondent could not administer the 30-day rule which she applied to federal pensioners as the exclusive method for obtaining post-deprivation remedy from the unconstitutional taxation. In determining when the 30-day demand

period began to run, respondent and her officials simply resorted to the date the taxpayer signed his return, rather than when it was actually filed. (JA 806-07, 602-03, 648.) Respondent had no method of date-stamping returns filed prior to April 15 and there was not an effective means for establishing when taxpayers "filed" their returns or "delivered" returns to the Postal Service for purposes of determining when the 30-day period began to run. Respondent's practice was to destroy or discard the taxpayer's envelope upon receipt so her officials could not even use the mailing date. Thus, respondent's method in determining when the 30-day period began to run (for the purpose of judging whether a demand was timely) operated in a random fashion and effectively denied thousands of retiree taxpayers due process of law.

(2) It was not the practice of respondent or her officials to apply the 30-day statute to refund requests of individual income taxpayers and respondent's officials had not previously interpreted the 30-day statute to apply to such requests. Respondent's own interpretation and explanation of regulations issued by her Department and published in the North Carolina Administrative Code, Individual Income Tax Instruction Booklets and Individual Income Tax Bulletins all advised taxpayers of the three-year refund remedy and none made the slightest mention of the 30-day rule. (JA 144-210.) Pursuant to N.C.G.S. § 105-264, respondent did in fact construe the tax refund statutes in every publication available to individual taxpayers by telling them they have *three years* to obtain tax refunds. Ample and unrefuted evidence considered by the district court, but ignored by the appellate court below, was that numerous CPA's and taxpayers relied on respondent's publications and advice (given before and after *Davis*) that the customary three-year rule applied. (JA 415-83.) Respondent's last-minute assertion of the 30-day rule, while convenient to her Department, was in direct contradiction to her established practice of allowing refund claims to be made within the normal three-year period.

Thus, the plain inference here discernible by any prudent fact-finder is that respondent crafted and implemented the 30-day bar as a method to avoid refunds.[47]

(4) Respondents' about-face in her post-*Davis* explanation of the governing remedy is analogous to retroactively shortening a statute of limitations. It is well settled that statutes of limitations may be modified by shortening the time prescribed only if done while the time is still running, *and* so that a reasonable time still remains for commencement of an action before the bar takes effect. *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 33 S.Ct. 1033, 57 L.Ed. 1427 (1913); *see also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682, 50 S.Ct. 451 (1930) ("Whether acting through its judiciary or its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."). At issue is the manner in which respondent "invoked" the 30-day demand requirement of N.C.G.S. § 105-267, and whether, *under the facts of this case*, respondent's about-face satisfies the clearly established commands of the Due Process Clause. The constitutionality of administrative demand requirements of a taxing authority must be determined "under all circumstances" of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 170 S.Ct. 652, 94 L.Ed. 865 (1950). Therefore, the undisputed facts of this case, especially those concerning the timing of respondent's drastic change of departmental policy concerning refunds and her complete inability to effectively administer it, justify a reversal on this issue.

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[47] Incredibly, respondent subsequently changed her position on refunds again when at the North Carolina Supreme Court she asserted that under *Chevron Oil Co.* v. *Huson, supra*, petitioners were entitled to no refunds at all notwithstanding her initial granting of refunds to more than 12,000 federal retirees who were fortunate enough to eke through the laggardly imposed 30-day window.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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October 21, 1991

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1110

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM Z. NICHOLSON, III, CHARLES L. DANCEY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALENA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, Individually and for the benefit and on behalf of all other similarly situated, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, PAUL H. TURNEY,
Plaintiffs-Appellees,

versus

HELEN A. POWERS, Secretary of the
North Carolina Department of Revenue,
Defendant-Appellant,

and

NORTH CAROLINA DEPARTMENT OF REVENUE;
HARLON BOYLES, Treasurer of the
State of North Carolina,
Defendants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Malcolm J. Howard, District Judge. (CA-89-282-5-CIV-H)

Argued: March 4, 1991 Decided: June 25, 1991

Before SPROUSE and WILKINSON, Circuit Judges, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Sprouse and Senior Judge MacKenzie joined.

ARGUED: John Robbins Wester, David C. Wright, III, ROBINSON, BRADSHAW & HINSON, P.A., Charlotte, North Carolina, for Appellant. Wallace R. Young, Jr., WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina; Charles H. Taylor, Winston-Salem, North Carolina, for Appellees. ON BRIEF: Lacy H. Thornburg, Attorney General of North Carolina, Marilyn R. Mudge, Assistant Attorney General, Raleigh, North Carolina, for Appellant. G. Eugene Boyce, Donald L. Smith, Jasper L. Cummings, Jr., Mark E. Richardson, III, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellees.

WILKINSON, Circuit Judge:

Helen Powers, former Secretary of Revenue for the state of North Carolina, faces potential liability of $140 million for her actions in enforcing the state revenue code. According to complainant taxpayers, Secretary Powers collected taxes from them during a four-year period when she should have known that to do so violated both the constitutional doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939. Because the law that plaintiffs claim Powers violated was not clearly established at the time, however, we hold that

she is entitled to immunity from suit and reverse the judgment of the district court.

I.

Under North Carolina law as of early 1989, former state and local government employees received a state income tax exemption for the full amount of their retirement benefits. Former federal civil service and military personnel could exempt up to $4000 of their retirement benefits. Private sector retirees in North Carolina received no exemptions, however.

On March 28, 1989, the United States Supreme Court reversed a decision of the Michigan Court of Appeals and declared unconstitutional a Michigan taxation scheme that was similar to North Carolina's in that it granted state income tax exemptions to retired state employees, but not to either federal or private retirees. *See Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803 (1989). The Court held that such a tax system discriminated against the federal government and thus violated the constitutional doctrine of intergovernmental tax immunity as well as the Public Salary Tax Act of 1939, codified, as amended, at 4 U.S.C. § 111. That decision affected approximately twenty states which had enacted exemptions similar to those promulgated by Michigan.

Two weeks after the *Davis* decision was announced, plaintiffs brought a class action under 42 U.S.C. § 1983 on behalf of all federal retirees residing in North Carolina (the "Class A" plaintiffs), seeking a refund of unconstitutional taxes paid for the tax years 1985 through 1988. The suit named as defendants the North Carolina Department of Revenue as well as various state officers in both their official and individual capacities. Defendant Helen Powers was Secretary of the North Carolina Department of Revenue during the relevant period.[1]

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[1] Powers has since resigned, effective April 30, 1990, and is thus being sued now only in her individual capacity.

Plaintiffs claimed that to give retired state employees a greater exemption than that granted to retired federal employees comprised unconstitutional discrimination under the doctrines underlying *Davis*. A second group of plaintiffs consisting of active-duty military personnel and reservists (the "Class B" plaintiffs) was later allowed to join the suit. They challenged a $1500 state income tax exemption granted to members of the North Carolina National Guard. While both classes of plaintiffs continue to pursue their claims against the state, they alternatively seek to hold Secretary Powers personally liable for the $140 million they claim to have overpaid.

Powers moved to dismiss the suit against her on the grounds of qualified immunity. Although she conceded that under *Davis* the unequal exemptions for federal and state retirees were unconstitutional,[2] she claimed that her conduct in enforcing the North Carolina revenue statutes from 1985-88 did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The district court denied the motion, ruling that the Supreme Court's decision in *Davis* was "inevitable" and that Powers should have known that she was collecting unconstitutional taxes. In so holding, the court pointed to the "long-standing principles" underlying the decision in *Davis*, specifically, the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939.

Powers appeals from the court's denial of her motion for dismissal.

II.

Government officials who are performing their official duties are generally shielded from liability for civil dam-

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[2] A few months after the *Davis* decision was announced, the North Carolina General Assembly amended its revenue statutes to treat federal and state retirees equally effective January 1, 1989.

ages. *Harlow*, 457 U.S. at 818. Immunity from personal liability "reflects the concern that civil damages awards against public officers for every judicially determined violation of constitutional rights would prove too expensive to the public, discourage public service employment and impair governmental decisionmaking." *Tarantino v. Baker*, 825 F.2d 772, 774 (4th Cir. 1987). We believe that to hold Secretary Powers liable because she failed to accurately predict the outcome of the *Davis* decision would work a miscarriage of justice leading to exactly such unacceptable consequences.

In this section we examine the law as it existed prior to the Supreme Court's decision in *Davis* and conclude that a reasonable state official would not have known that North Carolina's tax system was unconstitutional because at that time the law was not clearly established. Section III discusses the Secretary's potential liability to the Class A plaintiffs for her actions following *Davis*, and the final section examines aspects of the Class B plaintiffs' claims.

A.

Only violations of those federal rights "clearly recognized in existing case law" will support an award in damages under 42 U.S.C. § 1983. *Danenberger v. Johnson*, 821 F.2d 361, 365 (7th Cir. 1987). Public officials must be able to discharge their public duties free of an omnipresent fear of § 1983 liability. Only in that way can we be sure that government can continue to function efficiently while liability will fall properly upon only "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This tolerance for a range of reasonable public action is particularly important for those who must interpret often imprecise or incomplete legal precedent. "For the law, as lawyers best know, is full of perplexities." *Pennekamp v. Florida*, 328 U.S. 331, 371 (1946) (Rutledge, J., concurring). The dockets of courts are testaments in

a sense to the many questions that remain reasonably debatable. Holmes touched on this uncertain process when he defined "the law" as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious." O.W. Holmes, *The Path of the Law*, in The Common Law & Other Writings 173 (1982).

In interpreting qualified immunity then, we must appreciate the fact that the direction of the law may be difficult to ascertain. Thus, although public officials may be "charged with knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989). "A reasonable government official cannot necessarily be expected to recognize the significance of a few scattered cases from disparate areas of the law . . ." *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985). The requirement, after all, is that the law be clearly established, not simply possibly established or even probably established. Since qualified immunity is appropriate if reasonable officers could disagree on the relevant issue, *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988), it surely must be appropriate when reasonable jurists can do so.

B.

The question of clarity bears directly upon plaintiffs' contentions that Secretary Powers is personally liable for the $140 million that she collected in unconstitutional taxes from them during the years 1985-1988. They argue that even before *Davis* was decided, the doctrine of intergovernmental tax immunity as well as 4 U.S.C. § 111 clearly established their right not to be taxed in a discriminatory manner, and that a reasonable Secretary of Revenue would have recognized that North Carolina's tax system was discriminatory.

We disagree. Secretary Powers was enforcing a long-standing statute that was similar to enactments else-

where. The most pertinent judicial decisions had upheld comparable taxing schemes and the doctrine of intergovernmental tax immunty was, at best, ambiguous. We decline to proclaim in hindsight after the *Davis* decision that the unconstitutionality of differential tax exemptions had been clear all along.

Before turning to the specific case law, we will examine briefly the general legal landscape surrounding the tax exemptions at issue here. Nothing in that terrain demonstrates that Powers was remiss in her duties or that she knowingly violated plaintiffs' constitutional rights. To begin with, the tax exemption for former state employees' pensions had been in effect and unchallenged for nearly fifty years. Plaintiffs argue that federal retirees had been complaining of unfair taxation since at least 1979, but they point to no legal action resulting therefrom. In addition, nearly twenty other states had promulgated and were enforcing similar tax exemptions for former state employees. In short, Secretary Powers was administering a statute which had been continually enforced for decades and which was far from unique.[3] Nothing in these circumstances would have indicated anything other than business as usual to a state officer who had sworn to uphold the laws of her state.

Rarely will a state official who simply enforces a presumptively valid state statute thereby lose her immunity from suit. "Legislative classifications . . . are presumed to be constitutional." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988). Absent extraordinary circumstances, which are not present here, liability will not attach for executing the statutory duties one was appointed to perform. *Lemon v. Kurtzman*, 411 U.S. 192, 207-09 (1973). Government would come to a virtual

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[3] We do not, of course, imply that enforcement of a statute unique to a single state would result on that account in a loss of immunity. Such a rule would unduly penalize innovation in state government.

standstill if executive officials concluded that their safest course of action was to ignore the laws of the state and to take no course of action for fear of liability. Reliance upon the presumptive validity of state law may be "the paradigm" of objectively reasonable conduct that the grant of immunity was designed to protect. *Landrum v. Moats*, 576 F.2d 1320, 1327 n.14 (8th Cir. 1978). The usual practice must therefore be that "[u]ntil judges say otherwise, state officers . . . have the power to carry forward the directives of the state legislature." *Lemon*, 411 U.S. at 208. Plaintiffs have not shown anything here that would cause us to abandon this rule.

Turning next to the case law, we note that in determining whether the law is clearly established, the vintage of the asserted right is of less guidance than the specificity of the right. The right to due process, for example, might be considered clearly established because of the Constitution's Due Process Clause; however, "if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Rather, the "contours of the right" must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional. *Id.* at 640. We do not, of course, interpret the term "clearly established" to mean that government officials are always allowed one constitutional violation free of any liability. Nevertheless, the greater the similarity of the existing case law to the situation at hand, the greater its guidance to a reasonable state official. "[I]n the light of pre-existing law the unlawfulness must be apparent." *Id.*

The district court here stripped Secretary Powers of all immunity because it concluded that "*Davis* was inevitable." Yet the only rationale the court offered for that opinion was that "the doctrinal underpinnings of *Davis* are long-standing principles." The court's observa-

tion that the doctrine of intergovernmental tax immunity hails from the time of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is of little practical use to a state revenue secretary whose duty it is to administer the intricacies of a modern tax code.

Nor have plaintiffs pointed to any court decision prior to *Davis* that struck down tax exemptions like North Carolina's, despite the fact that numerous states had enacted such provisions. In fact, the only decisions addressing those laws had upheld them in the face of constitutional challenges. The case most directly on point was, of course, the decision of the Michigan Court of Appeals in *Davis v. Michigan Dept. of Treasury*, 408 N.W.2d 433 (Mich. Ct. App. 1987), ruling that any difference in the tax treatment of state and federal retirees was constitutionally justified by reasonable differences between those two groups. A similar taxing scheme in Arkansas had survived a challenge on equal protection grounds. *See Streight v. Ragland*, 655 S.W.2d 459 (Ark. 1983). This precedent alone suffices to show that the holding of *Davis* had not theretofore been clearly established. Even had the Michigan and Arkansas courts struck down the statutes of those states, we would be hard pressed to conclude, from the standpoint of our federal system, that a North Carolina revenue secretary must *sua sponte* cease to enforce the duly enacted tax laws of her state, without regard for the expressions of the legislature.

Lacking supportive precedent directly on point, plaintiffs emphasize a series of Supreme Court cases that establish the so-called modern approach to intergovernmental tax immunity. *E.g., James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. County of Fresno*, 429 U.S. 452 (1977). Plaintiffs maintain that the principles underlying intergovernmental tax immunity were so straightforward and easily applicable that

no further precedent was necessary to lead a reasonable official to the conclusion that North Carolina's laws violated the Constitution.

We do not regard these cases as clearly establishing that Secretary Powers' actions were unconstitutional, however. As an initial matter, the modern line of cases represents a shift in emphasis away from immunity from taxation and toward limitation of such immunity. *New York v. United States*, 326 U.S. 572, 581 (1946). Indeed, the vast majority of plaintiffs' cited cases held that the challenged taxes were constitutional.

More specifically, as Justice Stevens' dissent in *Davis* makes clear, the rationale behind the precedent might have suggested a different result in that case. In *United States v. County of Fresno*, 429 U.S. 452, 462 (1977), for example, the Court wrote that a tax would not violate the doctrine of intergovernmental immunity "so long as the tax is imposed equally on the other similarly situated constituents of the State." The Court had promoted that rule as being "the best safeguard against excessive taxation." *South Carolina v. Baker*, 485 U.S. 505, 526 n.15 (1988). The rule's potency stems from the political check that "is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Washington v. United States*, 460 U.S. 536, 545 (1983).

Because the Michigan tax applied to 4.5 million state citizens, including 24,000 federal retirees, and exempted only 130,000 retired state employees, Justice Stevens argued that an obvious political check on excessive taxation existed. Any discrimination visited upon federal retirees was additionally placed upon millions of other state citizens, so the tax burden was arguably "a matter of indifference to the Federal Government [since] it can fairly be said that federal employees are treated like

other ordinary residents of the State." *Davis*, 489 U.S. at 823-24 (Stevens, J., dissenting). Although Justice Stevens agreed that federal employes could not be singled out to shoulder a heavier financial burden than other citizens, he asserted that "[t]he intergovernmental immunity doctrine simply does not constitute a most favored nation provision requiring the States to accord federal employees and federal contractors the greatest tax benefits that they give any other group subject to their jurisdiction." *Id.* at 823. Thus a state official who examined North Carolina's tax system prior to *Davis* might easily have concluded that it worked no unconstitutional discrimination. Not only were federal retirees not treated adversely *vis-a-vis* the majority of retirees and other citizens in North Carolina, but they actually were accorded a benefit denied to those others.

We discuss the contentions in Justice Stevens' dissent not with any purpose of arguing that *Davis* was wrongly decided, but simply to illustrate that persuasive arguments could be and were fashioned on both sides of the issue, grounded in the same precedent. That *Davis* was decided by a vote of 8-1 does not determine that the law was clearly established prior to that decision. We do not think it wise to set up a rule that turns on the number of appellate votes a given argument acquires. Even a unanimous opinion may have resulted from a close and controversial debate. That the Supreme Court chose to write about the issue at all provides some degree of insight into the state of the law; presumably the Court would not squander its limited resources on an issue that was clearly settled.

Plaintiffs respond that even if the doctrine of intergovernmental tax immunity was imprecise, nevertheless 4 U.S.C. § 111 clearly should have indicated that North Carolina's taxation was illegal under federal law. Section 111 authorizes states to tax "pay or compensation for personal service as an officer or employee of the

United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensatoin." Plaintiffs argue that this statute, although facially a mere authorization to tax, additionally prohibits discriminatory taxation. Secretary Powers argues that prior to *Davis* it was not clear whether § 111 applied to retirement benefits received by former employees or whether it was limited by its very language to current employees.

We beleive that Secretary Powers could reasonably have concluded that § 111 did not prohibit North Carolina's taxation system. Certainly the Michigan Court of Appeals reached a similar decision regarding the reach of § 111. *See Davis*, 408 N.W.2d 433, 435 (Mich. Ct. App. 1987). Additionally, federal law often draws distinctions between employees and retirees. *E.g., Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-71 (1971) ("employee" as used in National Labor Relations Act does not include "retirees"); *see also Ernzen v. United States*, 715 F. Supp. 1483, 1485 (S.D. Cal. 1989) ("[n]owhere does the [tax] code define 'retirees' as 'employees.'"); 26 U.S.C. § 61 (a)(1), (11) (Internal Revenue Code distinguishing between "compensation for services" and "pensions").

In short, how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to *Davis*. The district court erred, therefore, in subjecting a state revenue official to personal liability because she failed to predict how the Supreme Court would rule. Because Secretary Powers acted reasonably in collecting taxes pursuant to North Carolina law, she is entitled to immunity from liability in damages for so doing.

III.

The Class A plaintiffs also argue that even if Secretary Powers is entitled to immunity for her pre-*Davis* actions, she is yet liable for continuing to collect fiscal year 1988 taxes in 1989 after the Supreme Court decided *Davis*. They also complain that Powers did not accord them an adequate post-deprivation remedy for the unconstitutional taxation because "without prior notice and contrary to established official practice and advice, [she applied] a 30-day refund demand requirement" as a method of preventing refunds.

Plaintiffs' arguments, however, omit certain important considerations. First, North Carolina law distinguishes between invalid or unauthorized taxes and incorrectly computed taxes. *Coca-Cola Co. v. Coble*, 238 S.E.2d 780, 783 (N.C. 1977); *see* N.C. Gen. Stat. §§ 105-266.1, 105-267 (1989). The thirty-day period for requesting refunds of unauthorized taxes is set by statute, not by the whims of the Secretary of Revenue. *See* N.C. Gen. Stat. § 105-267 (1989). Payment of the tax followed by a request for a refund is the exclusive means for remedying an unconstitutional tax in North Carolina. *Coca-Cola*, 238 S.E.2d at 783. Furthermore, the statutory requirement that taxpayers demand refunds of invalid taxes within thirty days of payment has been North Carolina law for approximately fifty years, which must have provided plaintiffs some minimum of notice.

Additionally, following the *Davis* decision, which was handed down on March 28, 1989, Secretary Powers sought an opinion from the North Carolina Attorney General regarding the effect of *Davis* on the state income tax system and the proper procedure for refunding unconstitutional taxes. The Attorney General's response, dated April 10, advised that under *Coca-Cola* and the appropriate statutes, "the Secretary of Revenue *is not authorized* to refund any taxes imposed illegally . . . unless they were paid 'involuntarily,' as indicated by a

demand for refund made within 30 days of payment." (emphasis added). On April 13, Secretary Powers issued a statement to the press publicizing the procedures for taxpayers to follow to obtain refunds, as well as the thirty-day request period. According to Powers, over $9 million has since been refunded to taxpayers under state law, which is as a general matter a preferable vehicle for pursuing refunds of state taxes than a § 1983 suit.

Plaintiffs' argument that Powers "changed" the refund procedures relies substantially upon statements in income tax bulletins regarding the statute of limitations. We find this reliance misplaced because the bulletins clearly state in their preface that they "do not cover all phases of the law." In fact, only the refund procedures under N.C. Gen. Stat. § 105-266 for routine overpayments due to miscalculation are discussed; the bulletins do not mention N.C. Gen. Stat. § 105-267, which applies to refunds of unconstitutional taxes.

Plaintiffs would have had Powers act beyond her statutory authority and issue refunds spontaneously. It cannot be that a state official who enforces a valid statute and who has in good faith sought legal advice from a state attorney general will nevertheless be found liable in damages for following that statute and that advice. *See Lemon v. Kurtzman*, 411 U.S. at 208-09; *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (reliance on counsel is evidence of good faith). It would be difficult to convince qualified citizens to enter public service if they faced the possibility of paying damages because they followed the law or did not include in a general informational pamphlet all the statutory minutiae of a complex tax code. Secretary Powers is entitled to immunity for her actions with respect to collecting 1988 taxes from the Class A plaintiffs.

IV.

The Class B plaintiffs are active duty national military personnel and reservists. They complain that they were discriminated against as federal employees in violation of the intergovernmental tax immunity doctrine because members of the North Carolina National Guard received an annual tax exemption of $1500 while they did not receive any exemption. *See* N.C. Gen. Stat. § 105-134.6 (b)(4) (1989).[4] They additionally protest that Secretary Powers continued until July 1990 to collect their taxes despite the decision in *Davis* and has denied all their refund requests.

Powers responds that the $1500 exemption for the National Guard was not unconstitutional. She maintains that the plaintiffs' argument is based on the alleged similarity between their jobs and a National Guardsman's job and that in reality those jobs are sufficiently dissimilar to justify differential tax treatment. Her second argument is that any discriminatory treatment is not unconstitutional because it is between two types of federal employees. Section 111, which "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity," *Davis*, 489 U.S. at 813, prohibits only discrimination "because of the source of the pay or compensation." In Powers' view, since the federal government pays 99% of the compensation for personal service disbursed to North Carolina National Guardsmen, the Guardsmen must be considered to be federal employees for purposes of intergovernmental tax immunity. At a minimum, she claims, the law is not so clearly established that she is personally liable for collecting plaintiffs' taxes.

We need not actually rule on the constitutionality of the $1500 exemption to decide the issue before us. We have already held that prior to *Davis*, the doctrine of in-

[4] The North Carolina General Assembly repealed the $1500 exemption effective January 1, 1990.

tergovernmental tax immunity would not have clearly prohibited such an exemption. Nor was it obvious following *Davis* that an exemption for the National Guard would be unconstitutional. Certainly if the Class B plaintiffs were not similarly situated to the National Guardsmen, then no violation occurred, but the record is barren of facts on that point. Even assuming that the two groups are similar, however, a reasonable state official could have concluded that the exemption was constitutional. The record shows that except when National Guardsmen are ordered into the service of the state in order to suppress riots or to provide disaster relief, they are compensated by the federal government pursuant to various federal statutes and regulations. Their paychacks are drawn on the United States Treasury. In 1989, state funds constituted only approximately one percent of the personal services compensation paid to National Guardsmen in North Carolina. The intergovernmental tax immunity doctrine prohibits discriminatory tax treatment of the federal government and those with whom it deals. Since the federal government pays both the Class B plaintiffs and the National Guardemen, it is at least arguable that an exemption for one of those groups creates no constitutional violation. On that basis we hold, without deciding the constitutional merits of the claim, that Secretary Powers is entitled to immunity from the Class B plaintiffs' suit.

V.

The ills that would result from allowing suits for damages against state officials who simply perform their official duties are evident. Suits such as these have the potential to threaten the foundations of our most basic governmental functions—in this case, the collection of the revenue. Because the plaintiffs' asserted rights were not clearly established and because Secretary Powers acted reasonably in enforcing presumptively valid state statutes, we hold that she is entitled to immunity from suit. The judgment of the district court is therefore

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 89-282-CIV-5-H

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, and PAUL H. TURNEY,
Class B Plaintiffs,

v.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE, and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Defendants.

ORDER

[Filed Aug. 16, 1990]

This matter is before the court on the defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons discussed below, the court grants the motion in part and denies it in part.

FACTS

The Class A Plaintiffs are retired federal employees who challenge former North Carolina income tax laws that treated the income of retired federal employees less favorably than the income of retired state employees.

Federal retirement income was subject to a partial exemption, but state retirement income was exempted completely. This taxing scheme is indistinguishable from that struck down by the Supreme Court in *Davis v. Michigan Dep't of Treasury*, —— U.S. ——, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989), under 4 U.S.C. § 111 and the principle of intergovernmental tax immunity. The plaintiffs allege that the state's administration of its income tax laws deprive them of their civil rights in violation of 42 U.S.C. § 1983, 4 U.S.C. § 111, and the equal protection and due process clauses of the United States Constitution.

Class B plaintiffs are active-duty military personnel and reservists who challenge the statutory $1500 annual income tax exclusion for compensation paid to members of the North Carolina National Guard. Both classes seek damages in the form of refunds, a declaration that the collection of tax on such income violates federal law, and an injunction barring the defendants from collecting such taxes in the future.

The defendants have filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The parties have extensively briefed the issues, and the court has conducted a lengthy hearing. Accordingly, the motion is ripe for ruling.

DECISION

I. The Tax Injunction Act

The defendants contend that this action is barred by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This statute applies to requests for declaratory relief, injunctive relief, and damages. *See California v. Grace*

Brethren Church, 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982); *Moss v. Georgia*, 655 F.2d 668 (5th Cir. 1981). The plaintiffs invoke the federal instrumentalities exception to the Tax Injunction Act. Alternatively, the plaintiffs contend that the state remedy is not plain, speedy, and efficient.

Under the federal instrumentalities exception, the Tax Injunction Act does not bar actions in which the United States or one of its instrumentalities is the plaintiff. *See, e.g., Dep't of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L.Ed.2d 414 (1966). The parties have cited to the court no federal cases holding that employees are or are not instrumentalities. The plaintiffs rely on language in *Davis* tracing the development of the right of federal employees to invoke the doctrine of intergovernmental tax immunity. The plaintiffs argue that under *Davis* the definition of a federal instrumentality is coextensive with taxpayers protected by intergovernmental tax immunity and 4 U.S.C. § 111.

The court finds, however, that federal employees are not federal instrumentalities exempted from the Tax Injunction Act. *Davis*, which began in the Michigan state courts, does not address the applicability of the Tax Injunction Act. The Court did, as the plaintiffs suggest, outline the development of the taxation of the employees of one sovereign by another. In so doing, the Court stated that 4 U.S.C. § 111 codified *Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L.Ed. 927 (1939). It is clear from *Graves* that federal employees were exempt from state taxation not because they were federal instrumentalities, but because they were employees of instrumentalities. 306 U.S. at 483 n.2, 485. *See also New York v. Graves*, 299 U.S. 401, 408, 57 S. Ct. 269, 272, 81 L.Ed. 306 (1937).[1]

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[1] In *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982), the Court held that independent contractors are not federal instrumentalities protected by the doctrine of inter-

Because intergovernmental tax immunity cases draw a definitional distinction between instrumentalities and their employees, the court concludes that a similar distinction exists under the Tax Injunction Act. This conclusion is supported by the fact that all cases applying the instrumentalities exception involve entities that are clearly distinguishable from the individual plaintiffs in this action. *See, e.g., Dep't of Employment*, 385 U.S. at 359; *Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60 (1st Cir. 1974); *Federal Land Bank v. Bd. of County Comm'rs*, 582 F.Supp. 1507 (D.Colo. 1984); *First Nat'l Bank v. Dickinson*, 291 F.Supp. 855 (N.D.Fla. 1968), *affirmed*, 393 U.S. 409, 89 S. Ct. 685, 21 L.Ed.2d 634 (1969). Moreover, several identical actions brought in federal court by federal employees have been dismissed pursuant to the Tax Injunction Act. *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884, 107 S. Ct. 274, 93 L.Ed.2d 250 (1986); *Todd v. Johnson*, 718 F.Supp. 1305 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F.2d 877 (M.D.Ala. 1989).[2] Accordingly, the court finds that the plaintiffs are not federal instrumentalities exempted from the Tax Injunction Act.

The court finds, however, that the state remedy is not plain, speedy, and efficient. A plain, speedy, and efficient remedy is one that provides a taxpayer with a full hear-

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governmental tax immunity. The Court drew a distinction between independent contractors and employees, whom the court described as "constituent parts" of the United States. *New Mexico*, 455 U.S. at 740, 102 S. Ct. at 1386. A possible interpretation of this case is that employees are instrumentalities. However, this case did not involve the Tax Injunction Act; rather, it seems to be consistent with the prior line of cases holding that federal employees are protected by intergovernmental tax immunity because they are employees of instrumentaiities, not because they are themselves instrumentalities.

[2] None of these cases specifically addressed the federal instrumentalities exception.

ing and judicial determination at which he or she may raise any and all constitutional objections. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981). The state remedy does not have to be equal to the federal remedy. *Ayers v. Polk County*, 697 F.2d 1375, 1377 (11th Cir. 1983). A state remedy is inadequate, however, if some "uncertainty" surrounds it. *Rosewell*, 450 U.S. at 516-17. The plaintiffs contend that the defendants have so confused the state remedy that it is impossible to enforce the plaintiffs' federal rights in state court.

The uncertainty surrounds the statute of limitations. The defendants contend that the plaintiffs' state remedy is governed by N.C. Gen. Stat. § 105-267, which provides that a taxpayer contesting the illegality of a tax must pay the tax and then file a written demand for refund within 30 days. If the refund is denied, the taxpayer has three years to file an action in the Superior Court of Wake County or the county of the taxpayer's residence. On its face, this remedy is plain, speedy, and efficient. *See Grace Brethren Church*, 457 U.S. at 412.

Confusion arises, however, out of the existence of N.C. Gen. Stat. § 266.1, which provides that taxpayers may file for refunds for mathematical or other errors within three years of payment. If no refund is given, the taxpayer has 90 days to file an action in the Superior Court of Wake County or the county of residence. The two statutes address different situations. Section 267 provides a remedy by which to contest illegal or unconstitutional taxes; section 266.1 provides a remedy by which to receive refunds for overpayment caused by mathematical or other errors. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

This remedy is uncertain because of the conduct of the individual defendants and the Department of Revenue. All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any*

request for refund may be made within three years of payment. This information was provided in "Individual Tax Income Bulletins" published by the Department of Revenue. Plaintiffs' Memorandum, Exhibit 2. The defendants' instruction booklets are to the same effect. Moreover, after *Davis* was decided, the Department of Revenue announced publicly that refunds of taxes paid within three years would be allowed under the customary practice. Plaintiffs' Memorandum, Exhibits 33,34. Taxpayers were not told of the 30-day rule until four days before the filing deadline for 1989, well after many of the plaintiffs had filed their returns.

The defendants, soon after the filing of 1989 tax returns, began denying *Davis* refund requests pursuant to the 30-day statute of limitations of section 267. They also raise this statute as a defense in related state court litigation and in this action. The defendants have thereby deprived the plaintiffs a full hearing and judicial determination of their claims. *Rosewell*, 450 U.S. at 513.

A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim.

The state remedy is also inadequate because it does not provide for a class action, thereby requiring individual litigation of thousands of refund claims. Each of the claims is small enough to make the cost of such litigation prohibitive. The plaintiffs estimate that Class A contains 89,111 members and that Class B contains 49,486 members. (Exhibits 10, 11, and 12). At the hearing, plaintiffs' counsel estimated the average refund to be approximately $700. Some courts have held that the unavailability of class actions does not in itself render the

state remedy inadequate. *See, e.g., Waldron*, 788 F.2d at 738. The court finds, however, that the absence of a class action procedure may be considered along with all other facts in determining whether the state remedy is adequate for purposes of the Tax Injunction Act.

The remedy provided by the state to the Class A Plaintiffs is the recently-enacted N.C. Gen. Stat. § 105-151.20. Pursuant to this statute, federal retirees who paid state income tax on federal retirement income for the taxable year 1988 may claim a tax credit in that amount in equal installments over a three-year period beginning with the taxable year 1990. This remedy is inadequate because it fails to take into account the time value of the plaintiff's money. The state is in essence admitting that the tax was improper, but some of the money will not be returned until five years after payment.[3] Furthermore, given that these plaintiffs are retirees, it is reasonable to assume that a certain number of them will die in the next three years and will never receive their money. Others may have no tax liability from 1990-1992 and so will be unable to use the credit. In reality, this remedy provides the class with only a partial refund. *See Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 303, 72 S. Ct. 321, 324, 96 L.Ed.2d 335 (1952) (remedy is inadequate if only partial refund will be recovered).[4] This statute provides no remedy to the Class B plaintiffs.

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[3] The Court in *Rosewell* held that the state's failure to pay interest and the unavoidable delay in the litigation process did not prohibit the remedy from being speedy or efficient. 450 U.S. at 517-22, 101 S. Ct. at 1231-33. The defendants, however, are doing more than not paying interest; they are intentionally extending the period for refund through as late as April 15, 1993. This delay is not the unavoidable result of litigation, but is the intentional choice of the state legislature.

[4] Furthermore, this legislation, enacted after *Davis*, treats federal retirees differently than other taxpayers in that the retirees must receive their refunds over three years instead of in a lump sum

For the above-stated reasons, the court finds that the state remedy is not plain, speedy, and efficient. *Hillsborough v. Cromwell*, 326 U.S. 620, 624-26, 66 S. Ct. 445, 90 L.Ed. 358 (1946). Therefore, this action is not barred by the Tax Injunction Act.

II. Comity

Since the court has found that the state remedy is not plain, speedy, and efficient for purposes of the Tax Injunction Act, it necessarily follows that the remedy is not plain, adequate, and complete for purposes of comity. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981). Therefore, comity does not bar the court from exercising jurisdiction over this action.

III. Eleventh Amendment

The plaintiffs' claims for monetary damages in the form of refunds are barred by the eleventh amendment. *Edelman v. Jordon*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). The plaintiffs attempt to characterize their action as one for "equitable restitution." The Supreme Court has stated, however, that plaintiffs may not circumvent the eleventh amendment by characterizing a damages claim as one for equitable restitution. *Edelman*, 94 S. Ct. at 1356. It has long been established that unconstitutional taxes may not be recovered from the state treasury. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed 1121 (1944); *Smith v. Reeves*, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140 (1900).

The plaintiffs contend that federal courts may order relief that has some effect on the state treasury. For

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payment. This legislation was enacted after the parties filed their briefs such that the parties have not addressed the issue of whether this remedy is an ongoing constitutional violation. *See* Footnote 5, *infra*.

example, in *Milliken v. Bradley*, 433 U.S. 267, 289, 97 S. Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977), a federal court ordered a state to spend $5.8 million to upgrade its educational system. In *Papasan v. Allain*, 478 U.S. 265, 282, 106 S. Ct. 2932, 2942, 92 L.Ed.2d 209 (1986), the Court distinguished between the expenditure of state funds necessary for future compliance with a court order and awards for accrued monetary liability. A federal court may order the former type of relief, but not the latter. It is clear, however, that the plaintiffs are seeking an award for monetary liability, which is precisely what the eleventh amendment forbids.

The plaintiffs suggest as a possible remedy a tax credit applied to future tax years. Substantively, however, this remedy is still one for accrued monetary liability that would be satisfied out of the general revenues of the state. The plaintiffs cannot avoid the eleventh amendment by receiving their award in the form of future tax credits, rather than present cash payments.

The plaintiffs contend finally that the eleventh amendment does not bar their damages claims because they are federal instrumentalities. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S. Ct. 808, 814-15, 13 L.Ed.2d 717 (1965); *FDIC v. New York*, 732 F.Supp. 26 (S.D.N.Y. 1990). The court previously ruled, however, that federal employees are not federal instrumentalities. *Supra*, pp. 3-5. Therefore, the court must dismiss the damages claims against the defendants in their official capacities.[5]

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[5] The eleventh amendment does not bar the damages claims against Powers in her individual capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38, 94 S. Ct. 1683, 1687 (1974). Nor does it bar the claims for injunctive and declaratory relief necessary to correct an ongoing constitutional violation. *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L.Ed.2d 371 (1985).

IV. Powers' Qualified Immunity

The defendant Powers contends that she is protected from the damages claims by the doctrine of qualified immunity. Powers is shielded from liability if she can show that her conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396, 410 (1982). It must be objectively discernible in light of the law as it then existed that the defendant's conduct would violate that right. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).

Powers contends that the *Davis* decision established a new rule of law. The court finds, however, that the doctrinal underpinnings of *Davis* are long-standing principles. Intergovernmental tax immunity has its genesis in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Similarly, 4 U.S.C. § 111, which plainly allows for only non-discriminatory taxation of federal employees, was enacted in 1939.

The substance of the defendant's argument is that she should not be required to forecast Supreme Court decisions at the risk of personal liability. In the court's opinion, however, *Davis* was inevitable. State officials should not be allowed to continue blatantly unconstitutional conduct until the courts specifically rule it unconstitutional. Powers had the statutory responsibility to regulate, monitor, advise, and act upon problems in administering the state tax code. *See* N.C. Gen. Stat. §§ 143B-218, 143B-219, 147-88, 105-257, and 105-453. Nevertheless, she collected unconstitutional taxes that she should have known were unconstitutional.

Soon after the enactment of 4 U.S.C. § 111, the North Carolina Attorney General reported in a February 12, 1940, Memorandum to the Commissioner of Revenue that section 111 "gives the consent of Congress to *non-*

discriminatory state taxation of the compensation of Federal employees." Plaintiffs' Memorandum, Exhibit 14. The state instituted its discriminatory tax scheme in 1941; potential problems were first noted in a 1941 *North Carolina Law Review* article: "This may be permissible with respect to such state taxes as the income tax (unless it eventually face[s] trouble because of non-exemption for other annuities)." 19 N.C.L.Rev. 435, 519 (1941). Furthermore, on or about July 29, 1988, the defendant's office received a report from the Federation of Tax Administrators which included a two-page discussion of *Davis v. Michigan*. Finally, the discrepancy between federal and state retirement pay taxation was the subject of internal discussions throughout 1988 and 1989. Plaintiffs' Memorandum, Exhibits 18 (Letter from Department of Revenue to Legislative Counsel for the Governor) and 19 (Tax Fairness Commission Report of January 11, 1989).

Powers now asserts that it was unclear until *Davis* whether retired [sic] benefits were compensation for purposes of the Public Salary Tax Act. The *Davis* Court, however, found it obvious that retirement benefits were compensation. 109 S. Ct. at 1504. Moreover, it has been long-settled in North Carolina that retirement benefits are compensation. *See e.g. Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942). Indeed, the defendant received withholdings on federal retirement benefits pursuant to a state statute authorizing income taxes from "wages" of federal employees. N.C. Gen. Stat. § 105-163.23. The court finds, therefore, that the defendant failed to recognize the legality of her conduct and that her conduct violated clearly established federal rights of which a reasonable person should have been aware.

CONCLUSION

Accordingly, for the reasons discussed above, it is hereby ORDERED that the defendants' motion to dismiss pursuant to the Tax Injunction Act and principles of comity is DENIED. The motion to dismiss pursuant to the eleventh amendment is GRANTED as to the claims for monetary relief against the state and DENIED as to all other claims. The motion of the defendant Powers to dismiss pursuant to the doctrine of qualified immunity is DENIED.

This the 15th day of August, 1990.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#22

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 22, 1991

No. 90-1110

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM Z. NICHOLSON, III, CHARLES L. DANCEY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALENA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, Individually and for the benefit and on behalf of all other similarly situated, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, PAUL H. TURNEY,
Plaintiffs-Appellees,

v.

HELEN A. POWERS, Secretary of the
North Carolina Department of Revenue,
Defendant-Appellant,

and

NORTH CAROLINA DEPARTMENT OF REVENUE;
HARLON BOYES, Treasurer of the
State of North Carolina,
Defendants.

CORRECTED ORDER

Upon consideration of the appellees' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Sprouse and Judge Mackenzie.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM Z. NICHOLSON, III, CHARLES L. DANCEY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALENA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, Individually and for the benefit and on behalf of all other similarly situated, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, PAUL H. TURNEY,
Plaintiffs-Appellees,

v.

HELEN A. POWERS, Secretary of the
North Carolina Department of Revenue,
Defendant-Appellant,

and

NORTH CAROLINA DEPARTMENT OF REVENUE;
HARLON BOYES, Treasurer of the
State of North Carolina,
Defendants.

ORDER

Upon consideration of the appellees' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Sprouse and Judge Mackenzie.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

APPENDIX D

LIST OF PARTIES TO THE PROCEEDING

Petitioners

Federal Pensioners—Class A

Norman W. Swanson
Henry F. Murray
Carl L. Whitney
William E. Nicholson, III
Charles A. Dancy
Melvin F. Eyerman
Ira N. Schwarz
John L. Powell, Jr.
Galina Elworth
Donald V. Wallace
William E. Denton
Robert A. Nisbet
Walter J. Bartnikowski
Ralph P. Hunt
Marion B. Zollicoffer
William H.Talbert
Billy Clark
Wallace M. Davis
Grady L. Strange
Hamilton M. Howe
Mary L. Pritchard
Robert B. Campbell
Browning Adams
Pritchard G. Adams
William H. Adams
Edward H. Allen
Flossie P. Allen
Joseph A. Allen
Rachel C. Allred
Helen L. Anctil
Leo I. Anctil
Ronald E. Anderson
Clarence P. Armstrong
Carroll W. Austin
F. L. Austin, Jr.
Donald P. Bahr
Paul Ballus
Charles D. Barker, Sr.
Walter E. Barkhouse
Edward C. Barret
James L. Baxter
Russell W. Beard
Bernard L. Beatty
Richard K. Bell
Leo E. Benade
Sherman W. Betts
Joseph H. Betz
Robert L. Blevins
Dranklin M. Blunt
Timothy C. Bolick
Margaret C. Boone
Henry A. Botkin
Alex Bourdas
Ola May (Tate) Bovender
Eugene A. Bowen
Lavaune K. Breda
Marlowe G. Breda
Trond G. Brekke
Laura B. Brendle
Millard Bridgers
Clarence M. Bridges
Doris K. Bridges

Cyrus H. Brooks, Jr.
Daniel R. Brown
K. A. Brown
William D. Brown
Betty P. Bullock
Robert S. Bullock
Findley Burns, Jr.
Ray G. Burrell
Richard E. Bush
James M. Byrne
Norman L. Carlton
Matthew E. Carmean
Frank Cates
J. Crawford Caton
Harry E. Chamberlain
Vincent H. Chase
Paul F. Chavez
Woodrow H. Childress
John G. Church
Herman L. Clanton
Robert L. Clarke
Charles C. Clausen, Sr.
Dennis E. Cleckner
Steve P. Clemenic
Lacy W. Coates
Rucia A. Cobb
James A. Coddington
Catheryn S. Coley
Laura K. Conder
James C. Conine
Marshall G. Cooper
Asbury Coward, III
Newton P. Cox
Ruth A. Cox
Burnette E. Creasman
Thomas J. Culkin
Hazel B. Curlee
Milton L. Dail
Beatrice G. Davis
Bernley S. Davis
Donald M. Davis
Essie M. Davis
George E. Davis
Robert J. Davis
Clifford H. Dawson
Calvin F. Dean
Orien G. Dean, Jr.
Jack M. Deaton
Violet B. Deitmaring
Arlen J. Devito
John E. Devlyn
Sara E. Devlyn
Joy E. Dickinson
Mrs. Leroy B. Dickinson
James E. Diffee
Delbert R. Dillon
Margaret H. Dopf
Raymond E. Dopf
Leroy M. Duffy
Charles F. Dupont
Bobby R. Eason
David Edmisten
Carl L. Effler
John H. Elder, Jr.
John R. Ellis
Manford G. Farr
Rita Festo
John J. Filan
Angelo A. Florentino
Robert W. Folden
Oscar F. Fowler
Melvin W. Fritz
Walton E. Fulcher
Robert C. Fuller
Walter E. Fuller
Frank W. Furches

Norman Carl Gaddis
Marshall L. Gaddy
Thomas B. Gardiner
Robert F. Geissler
William E. Gentner, Jr.
Thomas P. Ginn
Robert W. Goodman
John R. Gordon
Bernice C. Grandy, Jr.
Steven W. Grandy
Robert J. Green
Michael R. Greeson
James H. Griffin
Thomas M. Groome, Jr.
James W. Gross
Arthur S. Gunderson
Hert L. Hancock, Jr.
James M. Hardin
C. Lee Harris
Howard W. Harris
Paul H. Harvey
Roland R. Hatcher
Henry S. Heffley, Jr.
Carroll A. Hefner
Clarence J. Hensley, Jr.
Richard M. Heriot
Doris T. Herring
Novis S. Herring
Virginia R. Hildebrand
Mozelle L. Hinshaw
Herman J. Hipps
Rufus M. Hodgin
Donald R. Hoffman
Charles K. Hoffmeyer
Mary R. Holland
Edgar P. Holt
Ray Homesley
Ned A. Hood
Robert H. Hood
Stephen W. Hopkins
Clyde L. Howard, Jr.
Kevin G. Huges
Harvey R. Hurst
Sam P. Hyatt
John L. Irby
Mattie B. Ives
Francis Jacobs
Richard L. Jarrett
Jacqueline M. Jennings
Woodrow W. Jones
Donald L. Jorgenson
Kenneth R. Joseph
Patsie W. Joseph
Everette R. Keller
Bernard J. Kelley
Wilson P. Lemp
Howard Lee Kerr
Margaret C. Kerr
William S. Ketner
David L. G. King
Thomas M. King, Jr.
Evelyn W. Kinney
John E. Kirk
Paul E. Kirkland, Sr.
Raymond B. Kleber
George M. Knobl, Jr.
William F. Knopf
Max V. Krebs
William J. Kuhn, Jr.
James M. Langston, Jr.
Jane W. Langston
Elmer L. Lashua
John L. Latham
Daniel M. Lauderback
August R. Lawrence
Freida H. Lewis

Norwood P. Lewis
Henry G. Liles
Dorothy J. Liles
Walter E. Linthicum
Phyllis V. Lippard
George Lott
Robert P. Lucas
Allen M. Mabe
Thomas S. Maceluch
William F. Marcuson, Jr.
Warner G. Maupin
Lylton E. Maxwell
Oliver A. Mays
Andrew G. Mayse
Samuel S. McCachren
Elizabeth S. McCaskill
Elizabeth G. McDonald
Clyde W. McKirk
Donald D. McGuire
Norman H. McLaughlin
Doy W. McPhail
William Ray Medlin, Jr.
Ernest E. Miller
Margaret H. Miller
Edgar N. Millington
Harold J. Mitchener
Eugene E. Moody
Dorothy [illegible] Moore
James C. Moore, Jr.
Lucie E. Moorman
Robert M. Moose
Jack B. Morris
Regena E. Morrison
Stanley B. Morse
Woodford T. Moseley
George R. Muse
R. J. Nettles
Thomas G. Newport
John E. Nitsche
Alfred P. Norwood
Johnnie M. Ochoa
Elvin E. Oglesby
Oliver G. Oja
Russell E. Olson
Lloyd A. Osborne
Paul B. Osgood
William C. Page
Lee R. Paramore
Lewis W. Pate
Charles R. Patton
Vernon J. Peebles
W. W. Pegues
Mary E. Penn
John D. Penn
Elliotte T. Perkins, Jr.
William H. Perry, Jr.
Paul J. Phillippi
Richard L. Phillips
Ruby A. Phillips
Frank J. Piazza, Sr.
Dallas Pickard, Jr.
George A. Pinter
Edward W. Piper
Frederick H. Pless
R. F. Hoke Pollock, Jr.
Lewington S. Ponder
Elbert Y. Poole
Jennette C. Poole
Martha Boyce Poteat
Edwin H. Price
Charles R. Pugh
Daniel J. Quesenberry
Milton H. Quinn
Louise M. Rabbino
Thomas M. Ramsey
Jack G. Ray

Marshall G. Ray
Hazel S. Redmon
George R. Reinhart, III
Annie E. Renkel
Madge O. Reynolds
Franklin E. Richardson, Jr.
Allen W. Rigsby
George M. Roberts
Jennings B. Robinson
James P. Roth
Phifer P. Rothman
Harold E. Ruble
Hilda H. Rultenberg
Donald E. Russell
George W. Sabo
Lyle E. Samson
Robert L. Scheer
Frederick L. Schuerman, Sr.
Robert J. Schullery
Elwood M. Shaulis
Robert T. Sheridan
Stanley T. Shipley
Charles B. Shively
Charles A. Shue, Jr.
Ruth M. Shue
Elsie N. Simmons
Frederick E. Simmons
Mary B. Simpson
Manuel F. Siverio
Joseph A. Sizoo
Evelyn S. Smith
George B. Smith
James A. Smith
James E. Smith
James P. Smith
Joe F. Smith
Percy H. Smith
Joseph L. Sommer
Ray H. Spangler
James A. Sprankle
Wiley L. Standifer, Jr.
James W. Starbuck
Gertrude D. Starling
Stacy J. Starling
Henry C. Steed, Jr.
Roy C. Steeley
Arthur L. Stewart
Burlena J. Stewart
John R. Stewart, Jr.
George W. Stillway
Rita M. Stillway
Harold E. Stone
Clyde Dalton Stowe
Harry H. Strunk
E. C. Stumpf
Thomas A. Summey, Jr.
Ellis G. Sumner
Leo B. Sumner
Mildred Y. Sumner
Margaret K. Swink
James E. Sykes
Oliver B. Talbert
James D. Terrell
Clyde E. Thompson
Emogene M. Thompson
Fred L. Tracy
Rocco H. Trombello
John G. Truitt, Jr.
William H. Turk
James T. Vance
Frances A. Vanden
George W. Vanden
Ethel D. Vanhorn
Edward J. Vaughn
Edward Venkler
Roy L. Vick, Sr.

Kermit J. Vinson
Myrtle H. Vinson
William E. Wade
Floyd H. Waldrop
Wanda E. Wallace
Roland J. Weber
Grace F. Weiner
Lona C. Weisner
Lawrence O. Welch
Paul B. Welch, Jr.
George L. Westerlind
William B. White
T. M. Whittington, Jr.
George W. Wilkins
Robert S. Williams, Jr.
William C. Williams
Winton H. Williams
Harold P. Williamson
Edna Mae Wilson
Robert Graves Wilson, Jr.
Ernest G. Winstead
Peter S. Wondolowski
Robert V. Wood
Maynard B. Woodbury
Evelyn W. Woodbury
Jack R. Worley
John T. Worrell
George T. Worrell
George E. Yale, Jr.
William P. Yarborough

Federal Military Personnel—Class B

Charles L. Berry
Robert D. Lennon
Zebulon V. Moseley, III
Gary W. O'Neal
Milton S. Price
Martin L. Dpeicher
Paul H. Turney

Respondent

Helen A. Powers, former Secretary of Revenue for the State of North Carolina

Other Defendants Not Directly Involved in Appellate Decision

North Carolina Department of Revenue, Harlan Boyles, Treasurer of the State of North Carolina